

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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KEVIN W. TOBIN,

Plaintiff,

v.

LIBERTY LIFE ASSURANCE  
COMPANY OF BOSTON and  
LIBERTY MUTUAL  
INSURANCE COMPANY,

Defendants.

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Civil Action No. 05 CV 11179DPW

**DEFENDANTS' MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6)**

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Liberty Life Assurance Company of Boston ("Liberty Life") and Liberty Mutual Insurance Company ("Liberty Mutual")(collectively "the defendants") hereby move to dismiss the First Amended Complaint of plaintiff Kevin W. Tobin ("Tobin"). In support of this motion, the defendants respectfully refer this Court to the *Defendants' Memorandum of Law in Support of their Motion to Dismiss* and the *Affidavit of Richard E. Bowman* both filed herewith.

As addressed in detail in defendants' Memorandum of Law, Tobin's claims should be dismissed for the following reasons:

1. Tobin's claim under the Employee Retirement Income Security Act ("ERISA") for recovery of benefits and his common law breach of contract claim are barred by *res judicata*;
2. Tobin's common law breach of contract claim is preempted by ERISA;
3. Tobin's ERISA claim for recovery of benefits should be dismissed because it is untimely;

4. Tobin's claim that defendants failed to provide him with a copy of certain ERISA plan documents should be dismissed because Liberty Life is not the Plan administrator under ERISA, and therefore not required to provide such documents, and Liberty Mutual, the Plan administrator under ERISA, provided Tobin with those Plan documents to which he was entitled under ERISA within the 30-day statutory period; and

5. Liberty Life is not a proper ERISA defendant.

WHEREFORE, defendants respectfully request that this Court allow this motion and dismiss Tobin's First Amended Complaint.


**REQUEST FOR HEARING**

Defendants respectfully request a hearing on this motion.

Respectfully submitted,

LIBERTY LIFE ASSURANCE  
COMPANY OF BOSTON and  
LIBERTY MUTUAL  
INSURANCE COMPANY,

By their attorneys,

  
Alan D. Rose (BBO#427280)  
Richard E. Bowman (BBO# 645245)  
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Date: August 15, 2005

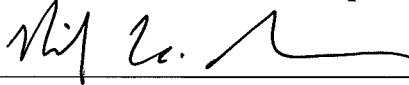
**CERTIFICATE OF SERVICE**

I hereby certify that on this day a true copy of the above document was served upon the attorney of record for each party ~~by mail~~/by hand.

Date: 8/15/05

CERTIFICATE OF CONCURRENCE WITH LOCAL RULE 7.1

Pursuant to Local Rule 7.1(A)(2), I hereby certify that on or about August 11, 2005, I spoke with plaintiff's counsel, Frank J. Frisoli, in an effort to resolve or limit the issues presented by this motion. I further certify that we were unable to resolve or limit the issues presented herein.

  
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Richard E. Bowman